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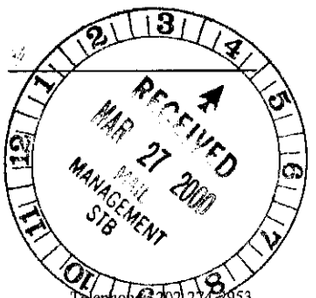

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March 27, 2000

Secretary

MAR 2[illegible] 2000

Part of
Public Record

VIA HAND DELIVERY

Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: *Public Views on Major Rail Consolidations*
STB Ex Parte No. 582

Dear Secretary Williams:

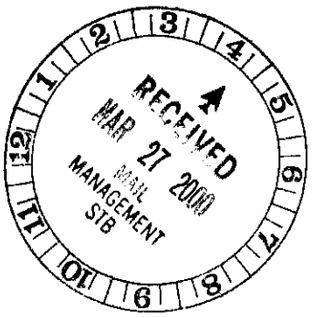
Enclosed herewith are an original and eleven (11) copies of Reply of The Kansas City Southern Railway Company to Petitions of Canadian National Railway Company, Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company for Stay Pending Judicial Review. A 3.5-inch diskette containing a copy of this letter and the Reply is also enclosed.

Please acknowledge receipt and filing of the enclosed statement by file-stamping the enclosed eleventh copy of the statement and returning that copy to the person making that filing for return to me.

Very truly yours,

William A. Mullins
Attorney for The Kansas City Southern Railway Company

Enclosure



BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582

PUBLIC VIEWS ON
MAJOR RAIL CONSOLIDATIONS

REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO PETITIONS OF CANADIAN NATIONAL RAILWAY COMPANY, BURLINGTON NORTHERN SANTA FE CORPORATION AND THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY FOR STAY PENDING JUDICIAL REVIEW

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March 27, 2000

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The Kansas City Southern Railway Company ("KCS") hereby replies to the "Petition of Canadian National Railway Company[1] for Stay Pending Judicial Review" ("CN Petition") and the "Petition of Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company[2] for Stay Pending Judicial Review" ("BNSF Petition"). Petitioners seek a stay of the decision issued on March 17, 2000 in this proceeding ("Decision") by the Surface Transportation Board ("STB" or the "Board"). Because Petitioners have not established the necessary elements for securing a stay, the BNSF and CN Petitions should be denied.[3]

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[1] Canadian National Railway Company is referred to herein as "CN."

[2] Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company are collectively referred to herein as "BNSF." BNSF and CN are collectively referred to herein as "Petitioners."

[3] KCS is aware that 49 C.F.R. § 1115.5(c) limits reply briefs to ten pages. Because both CN and BNSF filed separate petitions for stay pending judicial review, KCS could file a separate reply to each petition, each being subject to the ten page limitation rule Section 1115.5(c). As KCS is

BACKGROUND

In its Decision, the STB determined that in light of significant operational problems which have arisen after recent rail mergers and because it is unclear whether recent mergers have produced the customer benefits promised by their proponents, a reexamination of the Board's merger regulations is required. *Decision*, at 3. Additionally, the Board concluded that it would be impractical and disruptive to attempt to revise the merger regulations during the course of another major rail merger. *Id.*, at 2. Therefore, the Board's Decision imposed a 15 month moratorium on major merger activity (including the filing of a merger application by Petitioners) pending completion of a rulemaking aimed at reviewing and revising the Board's outdated merger guidelines. Petitioners now challenge the Board's authority to render that Decision, but their challenge is misplaced.

As an initial matter, KCS applauds the Board's decision to reexamine its regulations governing major rail mergers. For a number of years, KCS has publicly expressed its concern that the use of those regulations cannot afford an adequate review of potential rail combinations. Indeed, KCS' significant role in opposing the merger of Union Pacific and Southern Pacific in 1996 was premised in large part upon urging the Board to focus on whether the potential anti-competitive elements of that largely parallel combination could be adequately identified and remedied through existing merger guidelines and policies. The looming potential for a trans-continental rail duopoly, a situation cautioned by KCS but dismissed as extremist less than five years ago, now has numerous railroads, shippers, and legislators asking publicly whether a more extensive duopoly can be avoided without a change in the existing standards for merger review.

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replying to the petitions of both BNSF and CN, it has combined the two replies into one reply and therefore has exceeded the ten page limit. To the extent that the Board believes that the ten page limit contained in Section 1115.5(c) applies, KCS hereby moves the Board for waiver of the page limitation.

Given the sweeping changes which have embraced, and have been embraced by, the rail industry in recent decades, it is entirely appropriate to observe that many of the challenges facing the rail industry today were clearly not contemplated when the current regulations were fashioned. When the existing regulations were adopted to implement the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), the rail industry faced far different challenges. As the Board and many other parties have correctly observed, major concerns for the rail industry then focused on Class I bankruptcies, wholesale abandonments of main line track, and government ownership of failing rail franchises. In order to address these concerns, the Interstate Commerce Commission ("ICC" or the "Commission") was given merger regulations designed to pare track of excess capacity and facilities, release rail carriers from outmoded pricing restrictions, and return railroads to economic vigor.

While those goals remain laudable where applicable, it is becoming increasingly apparent that the existing merger regulations do not adequately highlight all of the concerns presented by a modern rail merger. From the service crises experienced during most recent mergers to the economic merits of the "one lump theory," from the debate over centralized decision-making to preserving shortline viability, from upstream competition to downstream effects, the existing merger regulations do not provide this agency with all of the tools it needs to effectively and responsibly review major rail mergers. As the Board's Decision recognized, a reassessment of those rules is clearly in order, and as the Board further recognized, it should not be reassessing those rules at the same time it would be required to evaluate major rail merger applications. The Board's Decision, therefore, is both logical and legal.[4]

[4] In replying to BNSF's and CN's Petitions, KCS takes no position as to the merits of the proposed BNSF/CN merger. Indeed, in the absence of a merger application, there is no merger on which KCS can take a position. KCS' support of the Board's decision to place a short moratorium on mergers pending the upcoming rulemaking, which will level the playing field for

ARGUMENT

Petitioners, concerned that their application for merger may be reviewed by the Board under new, more relevant standards rather than under the old rules, have now separately moved the Board to stay its Decision pending judicial review of the Decision. Petitioners correctly point out that their Petitions will fail unless they carry their burden of satisfying all elements of the familiar four-part injunctive test:

1. Likelihood of prevailing on the merits of their petition for review;
2. Irreparable harm will result if a stay of the Decision is not granted;
3. Harm from imposing a stay is not substantial; and
4. The public interest favors a stay.

Market Dominance Determinations - Product and Geographic Competition, Ex Parte No. 627 Slip op. at 2 (served Feb. 23, 2000); citing *Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Holiday Tours*"); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)("*Virginia Jobbers*"). Because Petitioners have not satisfied these standards, their Petitions should be denied.

I. PETITIONERS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

Petitioners claim that their requests for judicial review of the Decision have a reasonable likelihood of success on the merits. In order to buttress this assertion, both BNSF and CN claim that the Board exceeded its authority in entering the merger moratorium, and therefore claim that the Board will be reversed on appeal. More particularly, Petitioners claim that the Board did not have authority to issue the Decision under 49 U.S.C. § § 721(a) and 721(b)(4) and that even if

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all future mergers, should not be construed as any prejudgment by KCS of the relative merits of any future rail combinations.

those provisions provided such authority, the Board could not exercise that authority simply to prevent "irreparable harm." Rather, Petitioners assert that in order for the Board to issue a merger moratorium under § 721, it must meet the standards set forth in *DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, 149 F.3d 787 (8th Cir. 1998); *DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 42023, Slip op. (STB served Apr. 27, 1998) ("*DeBruce Grain*"). Petitioners claim that *DeBruce Grain* stands for the proposition that the Board must apply a four-part test similar to the *Holiday Tours/Virginia Jobbers* test, before it can exercise authority under 49 U.S.C. § § 721(a) and 721(b)(4). Because the Board's Decision did not make an explicit finding of how its merger moratorium satisfied such a four part test, Petitioners claim it was entered without authority, and thus constitutes reversible error.

Petitioners' argument gravely understates the Board's authority, which is well grounded both in the explicit grant of plenary authority bestowed upon the Board by Congress in Section 721(b)(4) and by the inherent powers of a regulatory agency, as recognized in the precedent set by this agency, its predecessor, and reviewing courts. Because Petitioners have interpreted the Board's jurisdiction too narrowly, neither BNSF nor CN has presented an argument which is likely to prevail on appeal.

A. The Board Had Broad Discretion Under Section 721(b)(4) To Issue A Merger Moratorium In Order To Prevent Irreparable Harm

As an initial matter, Petitioners' reading of Section 721 (b)(4) is far too narrow. The Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered section of 49 U.S.C.) ("ICCTA"), eliminated the ICC and established the STB, giving it its current powers. The STB's specific powers are enumerated in 49 U.S.C. § 721. In particular, the Board's power to issue injunctive orders is set forth in 49 U.S.C. § 721(b)(4): "The Board may when necessary to prevent irreparable harm, issue an

appropriate order without regard to subchapter II of chapter 5 of title 5." This was a new power created by Congress specifically for the STB, as the other provisions of Section 721 corresponded almost exactly to the earlier version of the ICC's authority. See 49 U.S.C. § 10321 (1995). The legislative history illustrates that Congress intended Section 721(b)(4) to authorize the Board to:

> issue unilateral emergency injunctive orders to prevent irreparable harm. This power has been asserted and used by the ICC in the past, although not specifically granted by statute. The Committee intends to confirm the scope of the former ICC power in this regard, and anticipates that the agency's authority to grant emergency injunctive relief will replace where necessary the repealed power in former section 10707 to suspend or otherwise enjoin actions that pose a threat of irreparable harm.

H.R. Rep. No. 311 (1995), reprinted in 1996 U.S.C.C.A.N. 793. The Conference Committee subsequently stated that it had intended to specifically grant to the STB "[t]he agency's previously established implied power to grant administrative injunctive relief." H.R. Conf. Rep. No. 422 (1995), reprinted in 1996 U.S.C.C.A.N. 850. The Committee stated that this new power was "[t]o *replace the prior power to suspend* and investigate rates under former section 10707. . . [and] to grant administrative injunctive relief to address imminent threats of irreparable harm." Id. (emphasis added). The Committee also said that situations would arise in the exemption context, "as well as in other areas of the Board's jurisdiction," where immediate action would be required because of threatening irreparable harm. Id. The Committee intended that "this power [be] fully available to address situations involving imminent threats of irreparable harm in the exemption context *and elsewhere*." Id. (emphasis added).

The broad wording of Section 721(b)(4), along with the legislative history, confirms that the STB was empowered with even broader statutory powers than those held by the ICC. This new power was to extend throughout the STB's jurisdictional reach and was to absorb all of the

ICC's prior implied power, and more.[5] With this broad statutory grant, interpreted through the legislative history, the STB can order a moratorium in any proceedings over which it has jurisdiction if necessary to prevent "irreparable harm." It is difficult to conceive of a situation in which the Board's exercise of its power would be of greater necessity than the forestalling of all mega-rail mergers until new "public interest" standards can be examined and possibly implemented.

The plain language of Section 721(b)(4) thus indicates that the only predicate to the Board's invocation of its injunctive powers is the finding of irreparable harm in the absence of action. The other elements of the *Holiday Tours* test (balancing of harms, likelihood of success on the merits, the public interest) were not mentioned in Section 721(b)(4), despite the fact that Congress was obviously aware of the standard requirements for granting an injunction. The only rational conclusion to be drawn from this circumstance is that Congress intended the Board to wield injunctive relief premised solely upon the potential for irreparable harm. Any other conclusion is unsupported either by the express language of the statute or the statutory history.

As previously mentioned, Petitioners cite to the *DeBruce Grain* cases in asserting that invocation of relief under Section 721(b)(4) requires satisfaction of all four elements of the *Holiday Tours* test. *DeBruce Grain* cannot be read so expansively. The Board's refusal to grant injunctive relief in its first *DeBruce Grain* order (*DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 42023, Slip op. (served December 22, 1997)) turned upon the fact that the petitioner could not establish irreparable harm as required in § 721(b)(4) for imposition of

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[5] In *Disclosure and Notice of Change Of Rates And Other Service Terms For Reciprocal Common Carriage*, STB Ex Parte No. 538 (STB served May 13, 1996)("*Disclosure and Notice*"), the STB reaffirmed its suspension power by stating that "[t]he carriers' argument ignores our express authority under new 49 U.S.C. § 721(b)(4) to grant administrative injunctive relief to prevent irreparable harm. As noted in H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 170 (1995), *this authority replaces the suspension process*." Id. (emphasis added).

injunctive relief. While the Board did state that it did not share petitioner's "narrow view that irreparable harm ...is the only relevant consideration in addressing its requests for injunctive relief," that comment is clearly dicta in light of the remainder of the Board's order. Moreover, nowhere in that decision did the Board state that relief under Section 721(b)(4) requires a full showing of the four elements required for injunctive relief in *Holiday Tours.* Although the respondents in *DeBruce Grain* argued at length that Section 721(b)(4) required more than a simple finding of "irreparable harm," the Board never voted on that proposition because its determination that irreparable harm was lacking mooted the issue.[6]

BNSF's citation to *Canadian Pacific Ry. Co. v. STB*, 197 F.3d 1165 (D.C. Cir. 1999) ("*Canadian Pacific*") is also wide of the mark. BNSF claims that *Canadian Pacific* stands for the proposition that agency orders may not contravene the plain language of a statute. BNSF Petition, at 6. However, the Board was reversed in *Canadian Pacific* not because Section 721(b)(4) did not provide authority for the Board's order (Section 721(b)(4) is barely mentioned, and not analyzed, in that decision), but because the D.C. Circuit believed that the Board had impermissibly "deferred to the inclinations of the executive department" in prohibiting Canadian Pacific Railway from transferring dispatchers to Canada. *Canadian Pacific*, at 1168. In addition, the *Canadian Pacific* case concerns the Board's authority to enforce or reject arbitral awards, a subject not at issue with the Decision.

Thus, notwithstanding dicta in *DeBruce Grain*, the plain wording of Section 721(b)(4), combined with the legislative history of the statute and the Board's prior use of that power in Disclosure and Notice, indicates that the Board can order injunctive type relief under the statute

[6] "[O]ur finding here that DeBruce's new basis for relief does not amount to irreparable harm likewise obviates our need to address that argument." *DeBruce Grain, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 42023, Slip op. at 4, n. 11 (served Apr. 27, 1998)

to prevent "irreparable harm" without applying a four part test like that set forth in *Holiday Tours*. The Board's Decision clearly set forth the reasons why its decisions was necessary in order to prevent irreparable harm. Indeed, even a cursory review of the Board's Decision reveals that it is replete with findings of the irreparable harm which would result from revising the Board's merger regulations while simultaneously reviewing a major rail merger.

> Not only would it be impractical for us to try to act on a final round of mergers while we are in the process of developing new merger rules, it would also be disruptive to the rail system and to rail service that remains well below acceptable levels in many areas. The disruption...could ***irreparably damage*** the entire industry, to the detriment of the interests of shippers, rail employees, and the national economy and defense.

Decision, at 2 (emphasis supplied).

Similarly, the Board found that concurrent revision of merger regulations and merger application review "would be inherently uncertain, could lead to substantial instability in the industry, and thus does not represent good government." *Id.*, at 7. "The disruption...could reach unprecedented levels...the already fragile rail industry could be further destabilized." *Id.*, at 8. "To go forward with an individual merger proceeding [while revising the merger guidelines]... would disrupt and distract the industry to the detriment of all of the public interest concerns that [the Board is] charged with advancing." *Id.*, at 9. These findings easily satisfy the "irreparable harm" standard of Section 721(b)(4). Therefore, at minimum, the Board's Decision was fully authorized by statute, and Petitioners cannot demonstrate any likelihood of success on the merits.

B. The Board's Legal Authority To Impose A Merger Moratorium Is Further Supported By Traditional Principles Of Administrative Law That Allow Agencies To Suspend Certain Activities During Rulemaking Proceedings

Furthermore, the power of the STB to enter a moratorium order stems not only from the explicit grants of statutory authority held in Section 721(b)(4), but also from the more broadly-based powers bestowed upon any agency to enforce its authority. Thus, strict compliance with

all of the elements necessary to secure an injunction, as would be required of a petitioner seeking injunctive relief from the Board, is not required of the STB when it is regulating transportation modes pursuant to its statutory grant of authority to protect the public interest. As was held prior to the expansion of the STB's authority under the ICCTA, "[t]he Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. As we have held in the past, the Commission also has discretion to take actions that are 'legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power.' " (citations omitted). *Interstate Commerce Commission v. American Trucking Ass'ns, Inc.*, 467 U.S. 354, 364-65 (1984).

The inherent authority of an agency to stay its review of pending proceedings while reviewing the propriety of applicable regulations has been repeatedly recognized by the courts. For example, in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Supreme Court upheld the Federal Power Commission's ("FPC") imposition of a two and one-half year moratorium upon filings of rate schedules while it implemented a new regional ratemaking scheme. The Court reasoned that the FPC's "broad responsibilities . . . demand a generous construction of its statutory authority." Id. at 776. The Fifth Circuit subsequently affirmed the Supreme Court's holding in *Permian* by upholding another moratorium imposed by the FPC that lasted five years under the same statutory authority. *Placid Oil Co. v. Federal Power Commission*, 483 F.2d 880 (5th Cir. 1973). In doing so, the court stated that the moratorium "was clearly a lawful exercise of administrative judgment." Id. at 908.

Similarly, in *Westinghouse Electric Corp. v. United State Nuclear Regulatory Comm'n*, 598 F.2d 759 (3rd Cir. 1979), the Third Circuit held that the Nuclear Regulatory Commission's imposition of a two-year moratorium upon its decisionmaking process regarding plutonium recycling, and its subsequent termination of pending proceedings regarding the issue, were valid

exercises of the agency's broad statutory mandate. The court cited *Permian* in stating that "an agency that is invested with such extensive powers to effectuate its far-reaching mandate may impose a moratorium upon its decisionmaking process when sound regulatory reasons exist for doing so . . ." Id. at 772. See also *Harvey Radio Labs. V. U.S.*, 289 F.2d 458 (D.C. Cir. 1961); *Mesa Microwave, Inc. v. FCC*, 262 F.2d 723 (D.C. Cir. 1958).

ICC precedent also illustrates that it is permissible for the STB to stay an individual proceeding in deference to outside factors, such as rulemakings, that would impact the outcome of any individual proceedings. For example, in *Rate Structure Investigation, Part 3, Cotton*, 165 I.C.C. 595 (1930), the ICC postponed consideration of certain rail-to-water rates on cotton pending a determination of the appropriate rail-to-water class rates for the southwestern portion of the country. *Rate Structure*, at 635-36. Similarly, in its investigation of arrangements used for transferring freight in the St. Louis-East St. Louis switching district, the ICC delayed disposition of the matter "because certain of the general principles were under consideration in other proceedings." *In The Matter Of Terminal Allowances And Rates At St. Louis, MO and East St. Louis, IL*, 34 I.C.C. 454 (1915).

More recently, the Western Coal Traffic League presented the Board with a petition for further rulemaking to eliminate "unreasonable paper barriers." *Review Of Rail Access And Competitive Issues*, Ex Parte No. 575, Slip op. (STB served March 2, 1999). Rather than rule on the petition, the Board "defer[red] action" because the Rail Industry Agreement had just recently been agreed to between the Association of American Railroads and the American Short Line and Regional Railroad Association, and that Agreement, it was hoped, would have an impact upon the Board's review of the paper barriers issue. *Id.* The Board also recently placed a rate complaint in abeyance for one year pending generation of appropriate accounting data. *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Company*, STB Docket No.

42038, Slip op. (STB served March 6, 2000). See also *Modifications To General Purpose Costing System – GPCS*, Ex Parte No. 477, Slip op. (ICC decided December 5, 1988) (indicating that it would be appropriate to hold the proceeding then before the ICC in abeyance if the Commission were guaranteed that a planned modification to the rail costing system – which would have an impact on the outcome of the matter then before the Commission – would be shortly adopted). These and other decisions amply illustrate that the STB has the authority to impose a moratorium when circumstances warrant without establishing the bases for a stay outlined in *Holiday Tours*.

Petitioners are essentially asking the Board to rule upon its merger application while ignoring the world around it. Despite the fact that Petitioners explicitly concede that the existing regulatory framework is in need of revision, they urge the Board to utilize outmoded and unresponsive regulations with, perhaps, some minor tweaks, but only to the extent those tweaks do not significantly raise the bar of approval past the level that BNSF and CN believe they (and, perhaps, only they) can now reach. However, the Board cannot ignore the fact that its merger regulations have not kept pace with the modern rail industry. Merger approval cannot occur in a vacuum, but must rather be responsive to the changing needs of a dynamic industry. It would therefore court disaster to measure the alleged public interest of any proposed rail merger, including BNSF-CN, under regulations designed to address concerns which no longer exist, or have been greatly modified.

II. PETITIONERS HAVE NOT ESTABLISHED THAT THEY WILL SUFFER IRREPARABLE HARM UNLESS A STAY IS GRANTED

As Petitioners recognize, in order to prevail on their Petition they must establish that they will suffer irreparable harm if a stay is not granted. Once again, however, Petitioners overstate their case. CN suggests that courts routinely recognize delay as demonstrating irreparable harm,

and that therefore the moratorium imposed by the Board's Decision constitutes irreparable harm. CN Petition, p. 8. BN cites the decision in *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) to support the proposition that "it is folly to treat delay as costless." BNSF Petition, p. 8. Neither of these positions squares with the law, or demonstrates irreparable harm.

In order to establish irreparable harm, a movant must establish more than mere delay. Indeed, if that were the standard, it would have no meaning because by definition every injunction involves a delay, and thus every injunction would impose irreparable harm. The form of irreparable harm which a movant is required to establish must arise from events which will (or are reasonably likely to) transpire during the delay; the delay itself does not constitute harm.

In this instance, it is unclear what cognizable, irreparable harm could befall CN and BNSF during the 15 month moratorium ordered by the Board. As CN points out in its Petition, the Decision halted not just CN and BNSF's imminent plan to file a merger application, but also the ability of any party to participate in "activity relating to any railroad transaction that would be categorized as a major transaction under 49 CFR 1180.2." Decision, at 10. Thus, to the extent that BNSF and CN believe they could be irreparably harmed by losing the temporal advantage they gained over the remaining Class I carriers in formulating their merger, such other carriers are also expressly prohibited from "closing the gap" during the moratorium. Thus, one could argue that such other carriers are as harmed as BN and CN.

Additionally, Petitioners ignore the fact that their Combination Agreement contemplates that, absent special circumstances, neither party may unilaterally terminate the agreement unless the merger has not been consummated by December 31, 2002. As the Board's moratorium will extend until June of 2001, and the Board is required to process any application filed after that time within 16 months (49 U.S.C. § 11325), the merger, if filed shortly after the moratorium

expires, will be ruled upon prior to December 31, 2002. Therefore, no harm to the Combination Agreement will result from the moratorium.

Petitioners reference the alleged benefits of their merger which they fear will be "lost" as a result of the moratorium, but there is no reason to believe this claim. The Board has done nothing to prohibit BNSF and CN from merging. It has merely interposed a short delay in order that the public interest might be better served through improved review standards and policies. The very fact that the Board will commence a rulemaking to review its merger regulations indicates that the Board does not intend to prohibit future rail mergers, but rather to improve them. Thus, merger benefits, to the extent they exist, will not be "lost," only delayed. Furthermore, this argument obviously begs the question. The "public benefits" which they claim will be generated by the merger and delayed by the moratorium of course must be balanced against the other "public interest" factors which the Board must consider in determining the over-all "public interest" of their merger. But of course it is just these other "public interest" factors which the Board will be re-examining in the course of its rule-making proceeding. Thus, we cannot know whether or not deferral of the claimed "public benefits" from petitioners' proposed merger is good or bad until the other "public interest" factors against which they are balanced ultimately have been determined as a product of that very rule-making proceeding.

Moreover, Petitioners ignore one of the cardinal rules of injunctions: monetary damages will not ordinarily constitute irreparable harm. *Borey v. National Union Fire Ins. Co. Of Pittsburgh, PA*, 934 F.2d 30, 33 (2nd Cir. 1991) ("*Borey*"). Thus, BNSF's calculation of the alleged annual benefits of its proposed combination with CN (BNSF Petition, p. 7) is unavailing; such "damages," were the Board to accept them as true, cannot qualify as "irreparable" harm.

Petitioners are also simply wrong when they claim that they are in any manner harmed by the Board's "failure" to follow the merger timelines set out in 49 U.S.C. § § 11324 and 11325.

No violations of either of the cited statutes has taken place. The statutes cited by Petitioners govern such issues as: the authority of the Board to begin a proceeding "on application of the person seeking [merger] authority," (49 U.S.C. § 11324(a)); acceptance or rejection of a filed merger application within 30 days (49 U.S.C. § 11325(a)); and the allotment of 45 days for filing written comments about a merger application after notice of the application is published in the Federal Register (49 U.S.C. § 11325(b)(1)). Clearly, the Board's responsibility to complete these tasks is dependent upon the filing of a merger application, which BNSF and CN have not yet done.[7] Petitioners' issues with the authority of the STB to issue a moratorium aside, they cannot claim that they will suffer harm stemming from the Board's alleged violations of various statutory obligations to review a merger application which has not yet been filed.

Finally, BNSF and CN also have not adequately demonstrated that the irreparable harm they allege is likely to occur. An applicant for a preliminary injunction "must show that it is likely to suffer irreparable harm if equitable relief is denied." *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2nd Cir. 1990). The mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction. *Borey*, at 33. Petitioners have done nothing more than speculate as to harm which they (or the general public) might experience unless a stay of the Board's Decision is granted. Such proof is insufficient to sustain a stay.

III. THE PUBLIC INTEREST STRONGLY FAVORS IMPOSITION OF A STAY

Petitioners are flat wrong in their attempts to demonstrate that the public interest would not benefit by, or would in fact be harmed by, a brief stay on railroad mergers while the Board conducts an extensive review of its merger regulations and policies. In fact, the public interest

[7] Although Petitioners have filed a "Notice of Intent" with the Board, that Notice is clearly not the "application" contemplated by the referenced statutes. The statutes do not direct any handling of a "Notice of Intent," which is governed solely by regulation, see 49 CFR § 1180.4(b) and the filing of such a "Notice of Intent" does not trigger the application of § 11324-11325.

will be well served by a stay because a stay is necessary to provide the Board with both the time and the singular focus it will need to adequately review its merger guidelines.

The necessity of revising the merger guidelines was conclusively established by the persuasive and compelling testimony of various parties during the recent hearings in this proceeding. Secretary of Transportation Rodney Slater called upon the Board to use the Ex Parte No. 582 proceeding to "refine your view of rail consolidations." *Statement of United States Secretary of Transportation Rodney Slater*, Ex Parte No. 582, dated March 7, 2000, p. 1. Similarly, OG&E Electric argued that the Board was "well advised to review the policies applicable to the rail industry, and in particular to rail mergers, to determine if the policies applicable to past circumstances are appropriate for the challenges facing the customers and providers in the industry in the future." *Comments Submitted on Behalf Of OG&E Electric Services*, Ex Parte No. 582, dated February 29, 2000, p. 1. The American Farm Bureau Federation agreed, commenting that existing merger policy "may not be sufficient to protect the interests of captive shippers." *Statement of the American Farm Bureau Federation*, Ex Parte No. 582, dated March 10, 2000, p. 4. As these and many other parties conclusively documented, existing merger regulations were not drawn with an understanding of the challenges facing the rail industry today, and therefore should be revised.

Perhaps notably, both BNSF and CN, the parties with arguably the most to gain from continued review of rail mergers under the existing regulatory constraints, have both recently indicated their agreement with the need to implement additional safeguards within the merger review process. For example, in his written testimony submitted in this proceeding, Robert Krebs, Chairman and CEO of BNSF, said:

> To restore the confidence of shippers in the rail sector's ability to provide improved, responsive service at reasonable rates following mergers and consolidations, I propose that applicants in future control transactions, including

> [BNSF-CN], should be required to address several specific issues about their post-combination operations and structure, so that the STB has the information it needs to evaluate whether a proposed transaction is in the public interest.

Statement of Robert D. Krebs, Burlington Northern Santa Fe, Ex Parte No. 582, dated March 7, 2000, pp. 16-17.

Similarly, Paul Tellier commented:

> [W]e think that it is time to refine the public interest to respond to shipper concerns about severe post-merger service disruptions. We need to raise the bar to assure that transactions achieve the service results that applicants promise...Just as you have integrated the review of safety and environmental issues into the control case review process, you should now integrate the service issue into that process.

Written Statement of Paul M. Tellier, President and Chief Executive Officer, Canadian National Railway Company, Ex Parte No. 582, dated February 29, 2000, pp. 19-20.

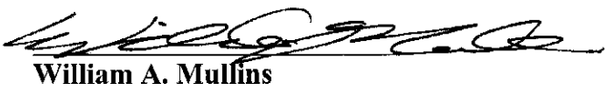
There appears to be unanimous agreement as to the necessity of revising the existing merger regulations. Thus, one must ask if the public interest is best served by allowing one merger to "sneak under the tent" under obsolete rules while all other mergers must satisfy more contemporary, relevant provisions, or if the public interest is better served if all mergers are halted while the merger regulations are rewritten. KCS believes that the answer is obvious, and hopes that all interested parties agree that whatever new or revised regulations might emerge from the Board's impending rulemaking, those regulations must be applied to all future merger applications, including any application that BNSF and CN might file. It would be utterly incongruous for all parties to agree to the need for revision, but to have the reviewing agency apply outdated regulations to one merger application merely because a notice of intent was expediently filed prior to commencement of a new rulemaking.

CONCLUSION

In summary, the Petitions for Stay filed by BNSF and CN should be denied. The need for reconsideration of the STB's major merger regulations has never been more thoroughly

documented. Adequate reconsideration of those regulations would be eroded if a major merger was being concurrently reviewed. Further, the Board has manifest jurisdiction to stay the filing or consideration of any merger application at this time, based both upon the Board's statutory jurisdiction and upon its inherent powers as a regulatory agency. Petitioners have failed to carry their burden to establish either a likelihood of success on their appeal of the Decision or any facet of irreparable harm arising from the Decision. Their Petitions must therefore be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this 27th day of March, 2000, I caused the foregoing "Reply of The Kansas City Southern Railway Company to Petitions of Canadian National Railway Company, Burlington Northern Santa Fe Corporation and The Burlington Northern and Santa Fe Railway Company for Stay Pending Judicial Review" to be served via courier delivery on Applicants' representatives:

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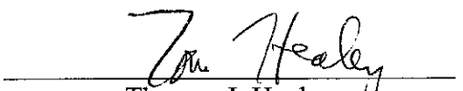

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